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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1163

EWALD B. NYQUIST, as Commissioner of Education of the STATE OF NEW YORK, JOSEPH W. MCGOVERN, EVERETT J. PENNY, ALEXANDER J. ALLAN, JR., CARL H. PFORSHEIMER, EDWARD M. M. WARBURG, JOSEPH T. KING, JOSEPH C. INDELICATO, HELEN B. POWER, FRANCIS W. MCGINLEY, KENNETH B. CLARK, HAROLD E. NEWCOMB, THEODORE M. BLACK, WILLARD A. GENRICH and EMLYN I. GRIFFITH, constituting THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Petitioners,

against

SUPHI SURMELI, GEVHER TURKAN ATAYALVAC, CEVAT NEZIROGLU, NEJAR CAGINALP, ALI MUSHIN TOSYALI, SUNGER TECE, SEMIH H. GUNDAY, and ALI GOKHAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ASHER B. LANS
Attorney for Respondents
555 Madison Avenue
New York, New York 10022
(212) 421-0700

ROBERT STEPHAN COHEN
DEBORAH E. LANS
LANS FEINBERG & COHEN
Of Counsel

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Respondents oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 24, 1976, summarily affirming the judgment of the United States District Court for the Southern District of New York, entered May 18, 1976.

Opinions Below

The decision of the Court of Appeals was rendered without opinion and is not yet reported; a copy of the order of affirmance appears in Petitioners' Appendix at page 1a. The opinion of the United States District Court for the Southern District of New York is reported at 412 F. Supp. 394 and appears at page 3a of the Appendix. The judgment of the District Court appears at page 10a.

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Did the courts below err in holding that New York's requirement that all physicians be or shortly become citizens in order to acquire or retain medical licensure is repugnant to the Equal Protection Clause of the United States Constitution since country of citizenship bears no relationship to a physician's ability to practice medicine?

2. Can the mere acceptance of medical licensure estop Respondents from challenging a state's constitutionally repugnant statutory discrimination against aliens where Petitioners cannot show any substantial change in position?

3. Did the courts below commit reversible error in declining to rule upon the Supremacy Clause claim because of the courts' disposition of the litigation upon Equal Protection grounds, where both claims were of constitutional

dimension, and the courts in alienage cases have consistently deferred decision on Supremacy Clause claims in order to determine other constitutional issues first?

4. Are state regulations imposing a citizenship requirement upon licensure for physicians repugnant to the exclusive federal authority to control immigration and naturalization, which authority forbids the imposition of special burdens upon employment of aliens?

Constitutional Provisions, Statutes and Regulations Construed

The constitutional provisions, statutes and regulations construed are set forth in the Petition, pp. 3-4.

Statement of the Case

Petitioners seek review of a judgment of the Court of Appeals for the Second Circuit (1a) which affirmed a judgment of the District Court for the Southern District of New York (Hon. Edward Weinfeld, J.) declaring unconstitutional New York Education Law §6525(6), former §6509 and 8 N.Y.C.R.R. §24.7, which provide that aliens licensed as physicians are subject to revocation of their licenses unless they acquire United States citizenship within ten years of licensure (10a).

The facts are not in dispute. Respondents are all lawfully admitted resident aliens and physicians duly licensed to practice medicine in the State of New York (3a). Each is in imminent danger of having his or her medical license revoked by virtue of the challenged statutes and regulation

(3a-4a). Petitioners are the Commissioner of Education and the members of the Board of Regents, the officials charged with enforcing the statutes and regulation in issue.

The challenged provisions (a) require all aliens seeking licensure as physicians to demonstrate United States citizenship or file a declaration of intention to become a citizen in order to qualify for licensure and (b) mandate revocation of the licensure of any alien qualifying under the declaration of intention provision if he or she fails to acquire citizenship within ten years of licensure (4a).*

These provisions were challenged below as denying Respondents the equal protection and due process of the laws and as a constitutionally impermissible interference with the exclusive federal authority to regulate immigration and naturalization.

Respondents moved below for summary judgment. The District Court granted the motion, declaring the statutes and regulation to be in violation of the Equal Protection Clause (8a). The Court declined, under the circumstances, to reach Respondents' remaining arguments (9a).**

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* Thus, Respondents are allowed to practice for a ten year period, to gain additional experience and competence, to become members of the medical community and to acquire the respect and confidence of their patients, only to have all of the foregoing destroyed by revocation of their licensure solely by reason of their alienage, a characteristic unrelated to the state's legitimate goals in imposing licensing requirements.

** In the District Court, Petitioners had argued in a footnote to their Memorandum of Law that the Supremacy Clause question should be reached first, although that contention was not raised again on oral argument of the motion for summary judgment.

Reasons for Denying the Petition for Certiorari

I.

The Courts Below Properly Held That Under This Court's Decisions the Citizenship Requirement Unconsitutionally Denies Respondents the Equal Protection of the Laws.

The constitutional issue decided below has long been settled by this Court. Classifications based upon alienage have been held to be inherently suspect and subject to close judicial scrutiny. *Examining Board of Engineers, Architects and Surveyors* v. *de Otero*, — U.S. —, 44 U.S.L.W. 4890 (1976).

The leading case in the area of professional licensure is *Application of Griffiths*, 413 U.S. 717 (1973), an action by a resident alien challenging a Connecticut state court rule restricting admission to the legal bar to United States citizens. In the course of its opinion, which held the citizenship requirement to be violative of the Equal Protection Clause, the Court urged that:

> "In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.*, at 721-2.*

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* Indeed, the Constitutional violation at bar is far more flagrant than that in *Griffiths* as the New York statute revokes the vested property right of physicians to practice their profession after ten years of licensure, solely because of alienage.

Also decisive are *Hampton* v. *Mow Sun Wong*, —— U.S. —, 44 U.S.L.W. 4737 (1976)—regulation barring noncitizens from employment in federal competitive civil service held unconstitutional; *Examining Board of Engineers, Architects and Surveyors* v. *de Otero*, — U.S. —, 44 U.S. L.W 4890 (1976)—state prohibition upon licensure of aliens as civil engineers held unconstitutional;* *Sugarman* v. *Dougall*, 413 U.S. 634 (1973)—statute excluding aliens from state civil service appointment held unconstitutional; *Graham* v. *Richardson*, 403 U.S. 365 (1971)—Equal Protection Clause prevents a state from conditioning welfare benefits upon beneficiary's possession of United States citizenship.

It is clear that the statute, regulations and practices at bar cannot withstand constitutional challenge. No legitimate purpose is served by revoking the licenses of noncitizen physicians after a ten year period solely because of their alienage. If such physicians were sufficiently competent to be licensed initially and no professional misconduct has been alleged against them, as here, suspension solely on the basis of alienage can only be viewed as a discrimination without rationale.

The fact that New York permits licensure of aliens in the first instance, but requires the acquisition of citizenship within ten years thereafter as a precondition to retenton of the license, does not save the statute. *See e.g.*,

* In *de Otero, supra*, this Court stated:

"It is with respect to this kind of discrimination that the States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible and that the discrimination is necessary for the safeguarding of those interests." *Id.*, at 4900.

Graham v. *Richardson*, 403 U.S. 365 (1971), where the challenged statute only barred aliens from receiving welfare benefits until they had achieved a specified period of residence within the United States; *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York*, 412 F. Supp. 1164 (E.D.N.Y. 1976), *U.S. app. pending; Norwick* v. *Nyquist*, 417 F.Supp. 913 (S.D.N.Y. 1976); *Mauclet* v. *Nyquist*, 406 F.Supp. 1233 (W.D.N.Y. 1976), *U.S. app. pending*.

Petitioners' argument that the state has a vital interest in encouraging full participation in political affairs by physicians is without merit. The state's only legitimate goal in imposing licensure requirements is to insure professional competence. In any event, a physician's lack of citizenship does not disable him or her from speaking publicly on questions of health care, medical ethics or medical procedures. Finally, there is no parallel requirement imposed upon citizen-physicians that they participate in public matters.

Similarly wanting in substance is the state's contention that alien physicians who fail to become citizens are more likely to remove from the country "leaving their patients to become familiar with another doctor" (Pet. p. 9). Indeed, the state's citizenship requirement has the contrary effect of compelling alien physicians to leave the jurisdiction within ten years of licensure. Moreover, although the state might legitimately impose regulations in order to insure the continued New York residence of physicians, it surely cannot constitutionally impose such regulations solely upon aliens.

II.

The Courts Below Correctly Held That Under Settled Decisions of This Court, the Doctrine of Estoppel Does Not Bar Respondents' Claims.

The courts below correctly held that the settled decisions of this Court did not preclude Respondents from challenging the constitutionality of New York Education Law §6525 (6), former §6509 and 8 N.Y.C.R.R. §24.7 merely because they accepted licensure thereunder (4a-5a). This Court has consistently mandated that the doctrine of estoppel have limited application. In *W. W. Cargill* v. *Minnesota*, 180 U.S. 452, 468 (1901), the Court stated:

> "[T]he acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or comply with any of the statute or with any regulations prescribed by the state . . . that are repugnant to the Constitution of the United States. . . . If the [state] refused to grant a license, or *if it sought to revoke one granted*, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, *the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings.*" (emphasis added.)

In *Ashwander, et al.* v. *Tennessee Valley Authority, et al.*, 297 U.S. 288 (1936), defendants argued that the plaintiff-shareholders, suing derivatively, were estopped to challenge the constitutionality of the act creating the T.V.A. because their rights were acquired from the company which had entered into contracts with the T.V.A. and which,

therefore, had accepted benefits under the very statute now challenged. In rejecting the argument, the majority wrote:

> "Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities." *Id.*, at 323.*

At bar, Petitioners can point to no detriment which will befall the state if the constitutional challenge is permitted. Hence, estoppel may not properly be invoked.

Additionally, the Circuit Courts uniformly have ruled that no estoppel may be applied where a plaintiff's sole activity is registration under a statute, as at bar. *North American Co.* v. *Securities & Exchange Commission*, 133 F.2d 148 (2nd Cir. 1943), *aff'd.*, 327 U.S. 668 (1946); *McDonald* v. *Key*, 224 F.2d 608 (10th Cir. 1955), *cert. denied*, 350 U.S. 895 (1955); *National Education Association, Inc.* v. *Lee County Board of Public Instruction*, 467 F.2d 447 (5th Cir. 1972).

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* *See also, Fahey* v. *Mallonee*, 332 U.S. 245 (1947), where the estoppel concept was limited to a challenge to the "important particulars, hardly severable" from the act under which the challenger seeks to retain benefits. At bar, the citizenship provisions are readily severable from the licensure statutes and unimportant to the state's goal of restricting licensure to qualified physicians.

III.

The Courts Below Did Not Err in Declining to Decide First the Constitutional Supremacy Clause Issue.

Petitioners contend that the courts below erred in declining to decide first the Respondents' claim that the challenged provisions constitute an impermissible interference with the exclusive federal authority to regulate immigration and naturalization and its concomitant aspects.*

Petitioners rely upon *Hagans* v. *Lavine,* 415 U.S. 528 (1974). However, in *Norwick* v. *Nyquist,* 417 F. Supp. 913 (S.D.N.Y. 1976), the Three-Judge Panel held that the *Hagans* procedure should not be followed where the Supremacy Clause claim asserts a conflict between a specific state provision and the general and exclusive federal power to regulate immigration and naturalization, as such a claim derives not from specific federal legislation but the Constitution itself. *Id.,* at 915-916.

Thus, in *Norwick* the Court stated:

> "Typically, the *Hagans* doctrine has been applied to cases in which specific State statutes or regulations are asserted to be in conflict with *specific* federal statutory or regulatory provisions. . . . It was that type of question, resting upon a *statutory comparison,* that *Hagans* denominated a 'Supremacy Clause ('statutory')' issue." *Id.,* at 916 (citations omitted; emphasis added.)

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* Even assuming, *arguendo,* that error was committed, plainly it was harmless and does not warrant review since in any event the courts would have found the challenged provisions to be unconstitutional. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456, *rearg. denied,* 318 U.S. 798 (1942).

The Court in *Norwick* found authoritative precedent in the numerous cases in which the courts have either declined to reach Supremacy claims or have reached those claims only secondarily. *See e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973); *Teitscheid* v. *Leopold,* 342 F.Supp. 299 (D. Vt. 1971); *Mohamed* v. *Parks,* 352 F.Supp. 518 (D. Mass. 1973); *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York,* 412 F.Supp. 1164 (E.D.N.Y. 1976), *U.S. app. pending.*

Peters v. *Hobby,* 349 U.S. 331 (1955), cited by Petitioners, indicates only a preference for decision of a limited statutory delegation-of-authority issue prior to constitutional claims, where the former will be dispositive. In *DeCanas* v. *Bica,* —— U.S. ——, 44 U.S.L.W. 4235 (1976), the sole issue presented was one of preemption and the procedural point urged at bar was never considered. In *Mathews* v. *Diaz,* —— U.S. ——, 44 U.S.L.W. 4748 (1976), *Hampton* v. *Mow Sun Wong,* —— U.S. ——, 44 U.S.L.W. 4737 (1976), and *Examining Board of Engineers, Architects and Surveyors* v. *de Otero,* —— U.S. ——, 44 U.S.L.W. 4890 (1976), the sole challenges, apart from jurisdictional issues, were based upon the Due Process and Equal Protection Clauses.

IV.

New York Education Law § 6525(6), Former § 6509 and 8 N.Y.C.R.R. § 24.7 Impermissibly Burden the Licensure Rights of Alien Physicians and Hence Unconstitutionally Interfere With the Exclusive Federal Right to Regulate Immigration and Naturalization.

As the Court in *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, at 419 (1948), ruled:

> "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid."

Under this analysis, provisions similar to those at bar have been held impermissibly to interfere with the exclusive federal power. *Truax* v. *Raich*, 239 U.S. 33, at 42 (1915).

At bar, the challenged provisions impose additional burdens, not contemplated by Congress, upon lawfully admitted aliens and hence are alsc invalid under the Supremacy Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Asher B. Lans
Attorney for Respondents
555 Madison Avenue
New York, New York 10022

Robert Stephan Cohen
Deborah E. Lans
Lans Feinberg & Cohen
Of Counsel

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